

**Reversed and Remanded and Opinion Filed December 17, 2024**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-24-00040-CV**

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**TERRIKA EVERETT, Appellant  
V.  
HARRY LANE ENEMAN, Appellee**

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**On Appeal from the 162nd Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-23-08587**

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**MEMORANDUM OPINION**

Before Justices Partida-Kipness, Carlyle, and Garcia  
Opinion by Justice Partida-Kipness

Appellant Terrika Everett appeals from the dismissal of her personal injury suit for want of prosecution. In a single issue, Everett contends the trial court erred in refusing to grant her verified motion to reinstate. We reverse the trial court's judgment and remand for further proceedings.

**BACKGROUND**

Everett's suit against Appellee Harry Lane Eneman arises from a vehicle accident that occurred on June 28, 2021. Everett alleges Eneman negligently drove his vehicle and struck Everett as she was walking in a Kroger parking lot crosswalk.

Everett filed suit against Eneman on June 27, 2023. The clerk issued citation the same day.<sup>1</sup> According to Everett, a process server attempted to serve Eneman on June 27-28, 2023. At that time, the process server was told Eneman was deceased. Everett's counsel was notified on June 29, 2023 of Eneman's death.<sup>2</sup>

The docket sheet does not reveal any further activity in the case until October 2, 2023, when the trial court sent an order setting the case for a dismissal/status hearing on October 27, 2023. The order stated, in relevant part:

The following may result in the Court's dismissal of the case for want of prosecution...

2. A return of citation or other filing demonstrating service on a Defendant has not been filed on or before the Dismissal Hearing...

4. Failure to prosecute the case with due diligence.

**Failure to appear at this hearing may result in the dismissal of this matter for want of prosecution pursuant to Texas Rules of Civil Procedure 165a and the Court's inherent power.**

(bold in original). Everett did not appear for the dismissal hearing, and the trial court dismissed the case on October 31, 2023. The dismissal order reads:

#### **ORDER OF DISMISSAL FOR WANT OF PROSECUTION**

The Court finds that Plaintiff(s) was duly notified of a dismissal hearing set on October 27, 2023. The Plaintiff(s) having failed to take certain action heretofore specified by the court within the time period prescribed, and having not disposed of this case, the court finds that the cause should be dismissed for want of prosecution pursuant to Tex. R. Civ. P. 165a. Accordingly,

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<sup>1</sup> According to the citation and Eneman's driver license, he was a Gregg County resident.

<sup>2</sup> Eneman died on April 14, 2023.

IT IS ORDERED that the case is dismissed for want of prosecution with costs taxed against Plaintiff(s), for which execution issue.

Everett filed a verified motion to reinstate on November 17, 2023. Therein, Everett's counsel stated he had received the October 2nd notice for the October 27th dismissal hearing, but his failure to appear was due to a clerical mistake in calendaring. Counsel stated his failure to appear was not intentional or the result of conscious indifference, but a simple mistake. Everett's counsel further stated he was diligently prosecuting the case.

Everett also filed a motion for scire facias substitution the same day as the motion to reinstate. Therein, Everett alleged Eneman died sometime after the motor vehicle accident at issue, and that Everett had identified a relative of Eneman believed to be an heir, representative, administrator, or executor of Eneman's estate. Everett requested the court issue a scire facias for Eneman's representative to appear and defend the suit.

At the December 6, 2023 hearing on Everett's motion to reinstate, the trial court inquired why there had been no activity for five months and why Everett had not filed the motion for scire facias earlier. Everett's counsel asserted that, after the process server made several attempts to serve Eneman, counsel attempted to locate Eneman at several addresses, and ultimately through research confirmed Eneman was deceased. The trial court also expressed concern that Everett had not provided any proof of Eneman's death with the motion for scire facias. The court further

indicated if Everett provided evidence that day of Eneman's death, the court would grant the motion to reinstate.

Around 1:00 p.m. that day, Everett filed an amended motion for scire facias substitution. Everett attached to the motion (1) an online obituary for Eneman, indicating his death on April 14, 2023, and (2) a photograph copy of Eneman's driver license. Everett's counsel then contacted the court several times between December 6, 2023 and December 29, 2023, inquiring as to the status of the motion to reinstate. However, the trial court took no further action, and the motion to reinstate was overruled by operation of law. *See* TEX. R. CIV. P. 165a(3). This appeal followed.

### **STANDARD OF REVIEW**

We review a dismissal for want of prosecution and the denial of a motion to reinstate under an abuse of discretion standard. *Welborn v. Ferrell Enterprises, Inc.*, 376 S.W.3d 902, 905 (Tex. App.—Dallas 2012, no pet.). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, without reference to any guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). A trial court also abuses its discretion when it fails to analyze or apply the law correctly. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016).

### **ANALYSIS**

In a single issue, Everett contends the trial court erred in refusing to grant Everett's motion to reinstate. We agree and sustain Everett's sole issue.

## **I. Legal Standards – Dismissal for Want of Prosecution**

A trial court's authority to dismiss a case for want of prosecution stems from two sources: (1) Texas Rule of Civil Procedure 165a; and (2) the court's inherent authority under common law. *Tunchez v. Houk*, No. 05-20-00330-CV, 2021 WL 5822839, at \*3 (Tex. App.—Dallas Dec. 8, 2021, no pet.) (mem. op.) (citing TEX. R. CIV. P. 165a; *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999); *Green Mountain Energy Co. v. Kela*, No. 05-18-01330-CV, 2019 WL 5128168, at \*1–2 (Tex. App.—Dallas Oct. 7, 2019, no pet.) (mem. op.)). A court may dismiss pursuant to Rule 165a when a party seeking affirmative relief fails to appear for any hearing or trial of which the party had notice, or when a case is not disposed within our supreme court's time standards. *Id.* (citing TEX. R. CIV. P. 165a(1),(2); *Villarreal*, 994 S.W.2d at 630).

In addition to the court's power to dismiss under Rule 165a, the common law vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence. *Id.* (citations omitted). Lack of diligence need not amount to abandonment for a case to be properly dismissed. *Crown Asset Mgmt., LLC v. Burnett*, No. 05-07-01186-CV, 2008 WL 3197098, at \*2 (Tex. App.—Dallas Aug. 8, 2008, no pet.) (mem. op.) (citing *WMC Mortgage Corp. v. Starkey*, 200 S.W.3d 749, 752 (Tex. App.—Dallas 2006, pet. denied)). The trial court may consider the entire history of the case,

including the length of time it has been on file, the extent of activity in the case, and the existence of reasonable excuses for delay. *Id.* No single factor is dispositive. *Id.*

Whether a case is dismissed for want of prosecution under Rule 165a or the trial court's inherent power, the trial court must reinstate the case if it determines the failure of the party or his attorney "was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." *Smith v. Babcock & Wilcox Constr. Co., Inc.*, 913 S.W.2d 467, 468 (Tex. 1995) (quoting TEX. R. CIV. P. 165a(3)); *Elite Door & Trim, Inc. v. Tapia*, 355 S.W.3d 757, 763–64 (Tex. App.—Dallas 2011, no pet.) (citing TEX. R. CIV. P. 165a(3), (4)). This standard is essentially the same as that for setting aside a default judgment. *Tunchez*, 2021 WL 5822839, at \*3 (citing *Smith*, 913 S.W.2d at 468). A failure to appear is not intentional or due to conscious indifference for Rule 165a purposes merely because it is deliberate; it must also be without adequate justification. *Id.* Proof of such justification—accident, mistake or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied. *Id.* Also, conscious indifference means more than mere negligence. *Id.*

When a verified motion to reinstate reasonably explains the failure to appear at a dismissal hearing and the record contains no controverting evidence that the failure was intentional or the result of conscious indifference, the trial court abuses its discretion by denying the motion. *Tunchez*, 2021 WL 5822839, at \*4 (citations

omitted). If the explanation in the verified motion is adequate to show mistake or accident, the movant need not present evidence supporting it at the oral reinstatement hearing. *Id.* (citations omitted).

## **II. Application**

### **A. Dismissal and reinstatement - Rule 165a**

The trial court indicated it was dismissing the case because Everett “failed to take certain action heretofore specified by the court within the time period prescribed, and having not disposed of this case.” Although the dismissal order does not specify what “certain action” was required, for purposes of Rule 165a, it could only refer to Everett’s failure to appear at the October 27, 2023 dismissal hearing. Everett does not dispute she failed to appear at the dismissal hearing. Accordingly, the trial court did not abuse its discretion in dismissing the case under Rule 165a(1) based on Everett’s failure to appear. *See Tunchez*, 2021 WL 5822839, at \*4 (trial court did not abuse its discretion for dismissing case for want of prosecution under Rule 165a where counsel failed to attend dismissal hearing).

Everett contended in her verified motion to reinstate that the failure to appear was not intentional or due to conscious indifference but was a mistake based on a calendaring error. There was no controverting evidence that the failure was intentional or the result of conscious indifference. Counsel’s calendaring error was a sufficient excuse to show that Everett’s failure to appear was not intentional or due to conscious indifference. *See Tunchez*, 2021 WL 5822839, at \*5. Accordingly, the

trial court abused its discretion to the extent it refused to grant Everett's motion to reinstate based on the failure to appear. *Id.*; see also *E & M Plumbing Ltd. v. W. Houston Winnelson Co.*, No. 01-17-00601-CV, 2018 WL 3542916, at \*3 (Tex. App.—Houston [1st Dist.] July 24, 2018, no pet.) (mem. op.) (counsel sufficiently established “accident or mistake” under Rule 165a and negated intent or conscious indifference by explaining he inadvertently failed to record the dismissal deadline in his calendar).

The trial court's order also indicated it was dismissing the case for Everett's “having not disposed of this case.” For purposes of Rule 165a, this could only refer to disposal within the supreme court's time standards. TEX. R. CIV. P. 165a(2). The supreme court's standards for disposal of civil cases are twelve months for non-jury cases and eighteen months for jury cases. TEX. R. JUD. ADMIN. 6.1(a). The record shows Everett filed suit on June 27, 2023. The trial court sent the notice of dismissal on October 2, 2023, and dismissed the case on October 31, 2023. This case was not pending beyond the time standards set by the supreme court. The record does not support dismissal pursuant to rule of civil procedure 165a(2). See *Oliphant Fin., LLC v. Galaviz*, 299 S.W.3d 829, 839 (Tex. App.—Dallas 2009, no pet.) (mem. op.). Accordingly, to the extent the trial court dismissed Everett's case or refused to reinstate it based on a failure to dispose of the case within the supreme court's time standards, the trial court abused its discretion.



**B. Dismissal and reinstatement – trial court’s inherent power**

Although the trial court mentioned Rule 165a in its dismissal order, the record suggests the court may have also relied on its inherent power to dismiss for want of prosecution. *See Crown Asset Mgmt., LLC v. Burnett*, No. 05-07-01186-CV, 2008 WL 3197098, at \*2 (Tex. App.—Dallas Aug. 8, 2008, no pet.) (mem. op.). The trial court’s notice of dismissal states, in relevant part:

The following may result in the Court’s dismissal of the case for want of prosecution...

2. A return of citation or other filing demonstrating service on a Defendant has not been filed on or before the Dismissal Hearing...
4. Failure to prosecute the case with due diligence.

When coupled with the dismissal order’s statement that Everett “failed to take certain action heretofore specified by the court,” the court may have relied in part on its inherent power to dismiss for want of prosecution. Indeed, at the hearing on Everett’s motion to reinstate, the trial court expressed concern over Everett’s failure to serve Eneman with citation or file a motion for scire facias sooner. Therefore, we also analyze this case under the rules governing the court’s inherent power to dismiss.

In the motion to reinstate, Everett stated her process server attempted service on Eneman on June 27th and 28th, 2023, and the process server was told of Eneman’s passing on June 28th. She further states her counsel was told of Eneman’s passing on June 29, 2023. Upon the trial court’s inquiry as to why Everett had not

filed a motion for scire facias sooner, Everett's counsel admitted there was some delay on their part in filing the appropriate documentation. He further claimed they were trying service at different addresses and through research confirmed Eneman was deceased. Everett's counsel added that the calendaring error and lack of knowledge the dismissal setting added to the delay.

The trial court also queried counsel on the lack of proof of Eneman's death and indicated it would grant Everett's motion to reinstate should counsel provide proof of death by the end of the day. A few hours after the hearing, Everett filed an amended motion for scire facias with a copy of an internet obituary for Eneman and a photographic copy of Eneman's driver license. Together, these documents supported counsel's assertions regarding Eneman's death and Everett's request for scire facias. *See* TEX. R. CIV. P. 152 (requiring the clerk to issue a scire facias upon a suggestion of death being entered of record or "*upon petition of the plaintiff.*") (emphasis added). However, the trial court did not rule on the motion to reinstate, and it was overruled by operation of law.

If the party can show reasonable diligence in prosecuting the suit, the trial court should grant the motion to reinstate. *See MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997) (the central issue in dismissal for want of prosecution is whether the plaintiff exercised reasonable diligence). Everett requested and attempted to serve citation and provided some excuse—her attempts to confirm Eneman's death and the calendaring error—for her failure to prosecute the case more swiftly. There was

no controverting evidence to support the failure to prosecute was intentional or the result of conscious indifference. *See Tunchez*, 2021 WL 5822839, at \*4. And, we are unaware of any case where a reviewing court upheld the trial court’s dismissal for want of prosecution when just four months passed between the time suit was filed and the case was dismissed. *See Najera v. Martinez*, 557 S.W.3d 846 (Tex. App.— El Paso 2018, no pet.)(dismissal of case pursuant to trial court’s inherent power was not justified, where case was on file just five months before trial court filed intent to dismiss for want of prosecution, and plaintiff consistently attempted to personally serve defendant with process). Considering the history of the case, including the length of time it has been on file, the extent of activity, and the existence of reasonable excuses for delay, while Everett perhaps could have been more diligent in prosecuting her case, we cannot say she failed to exercise “reasonable” diligence. *See MacGregor*, 941 S.W.2d at 75; *Tapia*, 355 S.W.3d at 763–64) (proof of accident, mistake, or other reasonable explanation negates the intent or conscious indifference for which reinstatement can be denied).<sup>3</sup> Under this record, and to the extent the trial court refused to reinstate the case based on the court’s inherent power to dismiss for want of prosecution, we conclude the trial court abused its discretion.<sup>4</sup>

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<sup>3</sup> We express no opinion whether Everett exercised sufficient diligence for purposes of the statute of limitations.

<sup>4</sup> Because we conclude the trial court abused its discretion in failing to reinstate the case, we need not decide whether the court abused its discretion in dismissing the case under its inherent power. *See TEX. R. APP. 47.1*.

## CONCLUSION

The trial court did not abuse its discretion in dismissing Everett's case under Rule 165a based on Everett's failure to appear. However, the trial court abused its discretion in refusing to reinstate the case after Everett reasonably explained the failure to appear was due to a calendaring error. And, to the extent the trial court dismissed the case and refused to reinstate based on a failure to adhere to the supreme court's time standards for disposal of cases, the trial court abused its discretion. The trial court abused its discretion to the extent it refused to reinstate the case based on the court's inherent power to dismiss for want of prosecution. We reverse the trial court's denial of Everett's motion to reinstate and remand this case for further proceedings consistent with this opinion.

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/Robbie Partida-Kipness/

ROBBIE PARTIDA-KIPNESS  
JUSTICE



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

TERRIKA EVERETT, Appellant

No. 05-24-00040-CV      V.

HARRY LANE ENEMAN, Appellee

On Appeal from the 162nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-23-08587. Opinion delivered by Justice Partida-Kipness. Justices Carlyle and Garcia participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 17<sup>th</sup> day of December, 2024.